

E-Filed 1/29/07

NOT FOR CITATION
 IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

IN RE MERCURY INTERACTIVE CORP.
 DERIVATIVE LITIGATION,

Case Number C 05-4642 JF (PVT)
 Case Number C 06-2971 JF (PVT)

TERRY KLEIN,

Plaintiff,

v.

AMNON LANDON,

Defendant.

ORDER VACATING HEARING
 DATE AND SETTING BRIEFING
 SCHEDULE FOR DERIVATIVE
 ACTIONS

On October 26, 2006, Defendants moved to dismiss the amended complaint in case number C 06-2971 JF (PVT). In that motion, Defendants referred to the pending all-cash acquisition of Mercury Interactive Corporation (“Mercury Interactive”) by Hewlett Packard Company (“HP”). Motion 5. In their reply to Plaintiff’s opposition, Defendants refer to a “potential” motion to dismiss for lack of standing. Reply 15. The Court concludes that the apparent acquisition of Mercury Interactive by HP raises a serious question as to Plaintiffs’ standing in the derivative actions (C 06-2971 JF (PVT) & C 05-4642 JF (PVT)), since Plaintiffs may no longer retain a financial interest in the outcome of the litigation. “Standing represents a

jurisdictional requirement which remains open to review at all stages of the litigation.” *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994). Accordingly, the Court concludes that it should resolve the apparent standing issue before it considers a motion to dismiss. The Court requests that Defendants file briefs arguing any asserted lack of standing on or before February 23, 2007.¹ Any opposition shall be filed on or before March 9, 2007, and any reply shall be filed on or before March 16, 2007. The Court will hear oral argument on March 30, 2007 at 9.00 a.m.

The hearing on Defendants’ motion to dismiss in case number C 06-2971 JF (PVT), filed October 26, 2006, and currently scheduled for hearing on February 2, 2007, is vacated. After it has resolved the issue of standing, the Court will determine if and when it should hear the motion to dismiss. The case management conferences scheduled for February 2, 2007 in case number C 06-2971 JF (PVT) and for March 9, 2007 in case number C 05-4642 JF (PVT) are continued to March 30, 2007, immediately following oral argument on the question of standing in the derivative litigation.

This order does not pertain to the related shareholder class action, case number C 05-3395 JF (PVT).

IT IS SO ORDERED.

DATED: January 29, 2007


JEREMY FOGEL
United States District Judge

¹ Defendants in the consolidated action C 05-4462 JF (PVT) and the related action C 06-2971 JF (PVT) should file separate briefs. The parties should follow Civ. L.R. 7-2 and Civ. L.R. 7-3 with respect to the form of the briefs, oppositions, and replies.

Copies of Order served on:

C 05-4642 JF (PVT)

Joel H. Bernstein	jbernstein@labaton.com
Asim M. Bhansali	amb@kvn.com, efiling@kvn.com; gap@kvn.com; pwm@kvn.com
Peter Arthur Binkow	info@glancylaw.com, pbinkow@glancylaw.com
Sara B. Brody	sara.brody@hellerehrman.com, terri.newman@hellerehrman.com; Cecilia.Chan@hellerehrman.com; Gary.Padilla@hellerehrman.com
Howard S. Caro	hcaro@hewm.com, gary.padilla@hellerehrman.com; yvonne.somek@hellerehrman.com; benjamin.diggs@hellerehrman.com; SFDocCal@hewm.com
Michael Cecchini	mcecchini@gibsondunn.com, jhess@gibsondunn.com
John D. Cline	jcline@jonesday.com, tmdanowski@jonesday.com; pdavids@jonesday.com; zanderson@jonesday.com; cyip@jonesday.com
Aaron H. Darsky	adarsky@schubert-reed.com,
Kirk Andrew Dublin	kdublin@jonesday.com, tmdanowski@jonesday.com; adlangenbach@jonesday.com; arsand@jonesday.com; mlandsborough@jonesday.com
Alan I. Ellman	aellman@labaton.com, cchan@labaton.com
Jeffrey S. Facter	jfactor@shearman.com, cflood@shearman.com; rcheatham@shearman.com; jae.ko@shearman.com
Scott A. Fink	sfink@gibsondunn.com, bhonniball@gibsondunn.com
Michael M. Goldberg	info@glancylaw.com
Louis J Gottlieb	lgottlieb@glrslaw.com,
Alicia G. Huffman	alicia.huffman@shearman.com, ron.cheatham@shearman.com; rcheatham@shearman.com
Benedict Y Hur	bhur@kvn.com, efiling@kvn.com; gpeterson@kvn.com
Willem F. Jonckheer	wjonckheer@schubert-reed.com
Nicole Acton Jones	nicole.jones@hellerehrman.com, harriette.louie@hellerehrman.com
Christopher J. Keller	ckeller@labaton.com, cchan@labaton.com
Jan Nielsen Little	jnl@kvn.com, efiling@kvn.com; srg@kvn.com

1 E. Powell Miller epm@millerlawpc.com, asl@millerlawpc.com
2 Elise Natalie Milstein emilstein@jonesday.com, mcassidy@jonesday.com
3 Patrick David Robbins probbins@shearman.com
4 Adam Richard Sand arsand@JonesDay.com, mlandsborough@jonesday.com
5 Michael Adam Schwartz mschwartz@wolfdopper.com
6 David R. Scott drscott@scott-scott.com
7 Michael Todd Scott tscott@orrick.com, adevlin@orrick.com
8 Arthur L. Shingler , III ashingler@scott-scott.com, ssawyer@scott-scott.com
9 C. Brandon Wisoff bwisoff@fbm.com, mzappas@fbm.com; calendar@fbm.com

10 Conor R. Crowley
11 Goodkind Labaton Rudoff & Sucharow LLP
12 100 Park Avenue
13 New York, NY 10017

14 Donald Delaney
15 100 Park Avenue
16 New York, NY 10017

17 Andrew T. Solomon
18 Sullivan & Worcester, LLP
19 1290 Avenue of the Americas
20 New York, NY 10104

21 Franklin B. Velie
22 Sullivan & Worcester, LLP
23 1290 Avenue of the Americas
24 New York, NY 10104

25 Robin Wechkin
26 Heller Ehrman LLP
27 701 Fifth Avenue
28 Suite 6100
Seattle, WA 98104

C 06-2971 JF (PVT)

23 Sara B. Brody sara.brody@hellerehrman.com, terri.newman@hellerehrman.com;
24 Cecilia.Chan@hellerehrman.com;
25 Gary.Padilla@hellerehrman.com

26 Cecilia Y. Chan cecilia.chan@hellerehrman.com

27 Christina Lucen Costley ccostley@wsgr.com

28 Kirk Andrew Dublin kdublin@jonesday.com, tmdanowski@jonesday.com;
adlangenbach@jonesday.com; arsand@jonesday.com;

1 mlandsborough@jonesday.com

2 Jared Lee Kopel jkopel@wsgr.com

3 Betsy C. Manifold manifold@whafh.com

4 Thomas James Martin tmartin@wsgr.com, dlewis@wsgr.com

5 Elise Natalie Milstein emilstein@jonesday.com, mcassidy@jonesday.com

6 Glenn F. Ostrager gostrager@ocfblaw.com

7 Stephen Lyle Porter slp@wpglaw.com,

8 Adam Richard Sand , Esq arsand@JonesDay.com, mlandsborough@jonesday.com

9 Paul D. Wexler wexler@bragarwexler.com

10 C. Brandon Wisoff bwisoff@fbm.com, mzappas@fbm.com; calendar@fbm.com

11 Andrew T. Solomon
12 Sullivan & Worcester, LLP
13 1290 Avenue of the Americas
14 New York, NY 10104
15
16
17
18
19
20
21
22
23
24
25
26
27
28